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No. 07-953

In The
Supreme Court of the United States

CITIZENS UNITED, *Appellant,*
v.
FEDERAL ELECTION COMMISSION, *Appellee.*

On Appeal from the United States District Court
for the District of Columbia

Reply to *Supplemental Brief for Appellee*

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Corporate Disclosure Statement

Citizens United has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

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Argument

The FEC errs in not applying the actual *language* of 28 U.S.C. § 1253 and ignoring congressional intent in *continuing* to provide BCRA's special procedures.

I. The Actual *Language* of § 1253 Controls.

The FEC quotes § 1253, FEC-Br. 5, but ignores its actual requirement. Congress gave this Court jurisdiction over appeals from "interlocutory or permanent injunction[s] in any . . . suit . . . required *by any Act of Congress* to be heard and determined by a district court of three judges" (emphasis added). The italicized language resolves the present issue. As set out in Appellant's prior brief, CU-Br. 1-9, the sole focus of "required" is what *Congress* "required" not what a *plaintiff* elected. Citizens United was categorically incapable of requiring anything *"by an[] Act of Congress."* It neither is Congress nor controls Congress.

The jurisdictional question is simple: Was there "an Act of Congress" that "required" convening a three-judge court? The same question faced the district court under 28 U.S.C. § 2284: Was there an "Act of Congress" that "required" it to convene a three-judge court?

There was such an "Act of Congress" that required the three-judge Court—Public Law 107-155 or BCRA. Section 403 sets out procedures governing constitutional challenges. Subsection (a) requires that challenges "shall be heard by a 3-judge court convened pursuant to section 2284 . . . ." Section 1253's jurisdictional requirement is met.

The only exception would be if subsection (a) were inapplicable. Subsection (d) governs the "applicability"

of (a). Subsection (a) is inapplicable only if a plaintiff after 2007 did not elect that it apply.

So a three-judge court is "required by an[] Act of Congress," 28 U.S.C. § 1253, under BCRA § 403(a), whenever BCRA § 403(a) is applicable, under BCRA § 403(d), with "applicability" determined by election. The question of whether a three-judge court is "required by an[] Act of Congress," under § 1253, must be answered only by looking to BCRA § 403(a), which is the only provision that addresses Congressional requirement of a three-judge court. Subsection (d) only answers the question of whether subsection (a) is applicable. If subsection (a) is applicable, it "require[s]" a three-judge court by congressional act, which triggers operation of 28 U.S.C. § 2284 (convening three-judge court) and 28 U.S.C. § 1253 (jurisdiction of appeals from interlocutory injunctions).

The FEC slips the question of whether a three-judge court is "required" from BCRA § 403(a) down to subsection (d). *See* FEC-Br. 3-7. But any "elect[ion]" in subsection (d) is *not* a "require[ment] by an[] Act of Congress, as § 1253 mandates. It is merely an election by a plaintiff. Section 1253 requires a search for a "require[ment]" done by *Congress*. BCRA § 403(a) provides that. Subsection (d) does not. Seeking in subsection (d) for the *congressional* "require[ment]" of a three-judge court that § 1253 mandates is searching for oranges at an apple stand.

Since 28 U.S.C. § 1253 is clear and plainly provides jurisdiction because its sole criterion is met by BCRA § 403(a), there is no warrant to search for interpretation principles. Yet the FEC does.

The FEC notes that this Court has declined direct appeals where a three-judge court was improperly convened, but concedes that "the three judge court in this case was properly convened after appellant elected that procedure . . . ." FEC-Br. 4. This is an important concession because 28 U.S.C. § 2284 requires the convening of a three-judge court where "required by Act of Congress." The FEC did not challenge the convening of the three-judge court and does not challenge it now, which means that the three-judge Court was "required by Act of Congress," which is the same trigger as § 1253's "required by an[] Act of Congress." The "require[ment] by . . . Congress" in both statutes is satisfied by BCRA § 403(a), and both statutes are applied in the context of the plaintiff having elected for subsection (a) to be applicable under subsection (d). The concession that the three-judge Court was "required by Act of Congress" for purposes of § 2284 vitiates the FEC's argument that the three-judge court was not "required by an[] Act of Congress" for purposes of § 1253. The FEC's inconsistent arguments as to §§ 1253 and 2284 reveal the weakness of its jurisdictional argument.

The identical triggering requirement in §§ 1253 and 2284 reveal that Congress could not have intended to grant a three-judge court without also granting direct appeal under § 1253. Identical triggers mean that the FEC's argument as to § 1253 precludes a three-judge court under § 2284. To be consistent, the FEC must say that, since a plaintiff is not required to elect the BCRA option, the "required by Act of Congress" trigger in § 2284 is not met and BCRA plaintiffs get no three-judge courts. But Congress clearly intended that

plaintiff election under BCRA § 403(d) would make the congressional three-judge court requirement in § 403(a) applicable and so meet the "required by Act of Congress" trigger of § 2284. The FEC concedes this congressional intent by arguing that a plaintiff making the election under § 403(d) gets a three-judge court. FEC-Br. 7, 10-11. But since the triggers are the same, if Congress intended a three-judge court it also intended jurisdiction under § 1253.

Congress must be presumed to know its own statutes. *Cf. McConnell v. FEC*, 540 U.S. 93, 211 (2003) (Congress presumed to know of this Court's decisions). So it must be presumed to have known that § 1253 had the same trigger as § 2284. That is why there was no need to "establish a BCRA-specific mechanism for appealing an interlocutory order." FEC-Br. 2. Congress knew that there was such a mechanism in § 1253, triggered by its requirement of a three-judge court in BCRA § 403(a). So it must be presumed that if Congress intended that the trigger in 28 U.S.C. § 2284 would be met, then it intended that the identical trigger in § 1253 would also be met. The FEC's arguments fail to overcome this necessary presumption of congressional knowledge and intent.

The FEC argues that "this Court has applied a rule of narrow construction" in resolving "doubtful questions" under § 1253. FEC-Br. 5. Nothing is "doubtful" here, so construction rules are unneeded. And the rule referenced came from before Congress repealed most direct appeals, so that "[t]he basic reasons for construing the statutes so strictly have large disappeared." *See* Eugene Gressman et al., *Supreme Court Practice* 100-01 (9th ed. 2007). In its prior brief, Appellant discussed

how this has resolved inundation concerns and cited the opinion in *Supreme Court Practice* that "the Court can no longer be said to be overburdened by the few appeals from three-judge district courts that are now being filed and heard." CU-Br. 10 n.2 (citation omitted). That authority also notes that the repeals call into question the "rule of narrow construction" that the FEC now cites: "[T]he coverage of the surviving three-judge court statutes is so narrowly defined as to make a restrictive interpretation unnecessary and, at least in some circumstances, inconsistent with the intent of Congress." *Supreme Court Practice* 102.

Moreover, the same Congress cited in *Goldstein v. Cox*, 396 U.S. 471, 478 (1970), as having the purpose of narrowly confining this Court's docket, *see* FEC-Br. 5, specifically enacted a new direct appeal statute, BCRA § 403(a), both for "final decisions" and interlocutory appeals (because Congress must be presumed to have known of § 1253). A congressional intent to limit direct appeals that is evident in the repealing of direct-appeal requirements cannot logically be argued as the basis for avoiding direct appeals where the same Congress expressly enacted this new direct-appeal statute. Congress intended no rule of narrow construction.

II. Congressional Intent in *Allowing* the BCRA Option Controls.

BCRA is unique in allowing continued plaintiff election of the special procedures of BCRA § 403(a). The FEC concedes uniqueness, FEC-Br. 4, but ignores its implications for congressional intent. Congress recognized that BCRA operates in an especially-sensitive area that requires the special procedures. Congress has done this in other important contexts, as

when civil rights are violated in public accommodations, where the Attorney General may elect a single- or three-judge court, with expedition similarly required. *See* 42 U.S.C. § 2000a-5.[1]

Congress believed that plaintiffs should continue to have access to § 403(a)'s special procedures—for plaintiffs finding more benefits than detriments in them. Congress indicated no intent to diminish the special procedures after 2006. BCRA's uniqueness shows the high value Congress placed on plaintiffs having undiminished access to the special procedures. This intent requires an approach that seeks to affirm and promote the special protections that Congress afforded plaintiffs against BCRA.

The FEC seeks instead to limit protection by an appeal to "Congress's broader purposes," FEC-Br. 7-9, and the other "benefits of . . . election." FEC-Br. 10-11.

As to "broader purposes," the FEC argues that what Congress was really trying to avoid was "'improvident doom at the hands of a single judge.'" FEC-Br. 7 (citation omitted).[2] The implication is that the only

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[1]This unilateral election of three-judge courts answers the "asymmetry" argument. FEC-Br. 10-11 n.2. BCRA § 403(a) allows direct appeal of "final decisions" although plaintiff elected the three-judge court. Strict scrutiny even imposes asymmetrical burdens on the government.

[2]The FEC here seeks to justify a rule of narrow construction for § 1253 by quoting a holding that a direct appeal would be heard "'only where such an order rests upon resolution of the merits of the constitutional claim presented below.'" FEC-Br. 7 (citation omitted). Whether

(continued...)

purpose served by a three-judge court statute was to avoid consideration of important constitutional matters by a single judge and Congress didn't care about direct appeals. But that is not so, else Congress would not have provided direct appeals, as to interlocutory and permanent injunctions, from three-court decisions in § 1253 (and in such specific provisions as BCRA § 403). Congress implemented three-judge court requirements and direct appeal so that in highly important matters the additional step of having a matter heard by three judges could be skipped. A three-judge district court essentially acts as the usual three-judge panel, thereby allowing the appellate process to skip a step. *Cf.* 2 U.S.C. § 437h (skipping district court by requiring cases challenging FECA provisions to be immediately certified by the district court to the court of appeals for en banc review). These statutes are not just about providing multiple judges but are also about expedited appellate review (by removing one of the usual layers), judicial economy, and the importance of the matters under consideration.

The FEC relies on the fact that Congress did not mandate BCRA § 403(a) procedures after 2006, arguing that Congress apparently did not think them necessary. FEC-Br. 8-9. This argument would mean that a three-judge court shouldn't be available either,

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[2](...continued)
the former rule of narrow construction survives has been discussed, but the denial of the present preliminary injunction did "rest[] upon the merits," as the FEC concedes. FEC-Br. 8. So the FEC's point that "it [is not] sufficient that a three-judge court was *properly* convened," FEC-Br. 6, goes nowhere, even if the "resolution of the merits" rule applies.

because Congress did not make it necessary. But the FEC's essential flaw is in ignoring the implications of Congress continuing to make BCRA procedures available, which indicates that Congress thought that the special procedures are essential to plaintiffs finding them useful. It is illogical to argue that Congress thought special procedures were unimportant because it no longer *requires* them. when Congress has taken the extraordinary step of *requiring* them for plaintiffs electing them.

Finally, the FEC argues that if dismissed Appellant "will receive every procedural safeguard specified in BCRA § 403(a) itself." FEC-Br. 10. As already discussed, Congress would have intended to include interlocutory direct appeals under § 1253 without mentioning them because it knew that the three-judge court would trigger them. It intended jurisdiction, and this sort of case requires this Court's prompt review of preliminary injunctions.

Conclusion

This Court has jurisdiction.[3]

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[3]In light of the time for notice of appeal to the court of appeals expiring on March 17, if this Court dismisses this appeal for lack of jurisdiction on or after that date, Appellant requests a remand for a fresh order from the district court.

Respectfully submitted,

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